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Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 632.

BOSTON & MAINE RAILROAD,
Petitioner,

v.

ARLENE M. HALL, EXECUTRIX,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM B. SLEIGH, JR.,
60 State Street,
Boston, Massachusetts,
CHARLES E. HOLLY,
84 State Street,
Boston, Massachusetts,
Attorneys for Respondent.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

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Statement of the Case.

The respondent adopts the statement of the petitioner appearing on pages 2 and 3 of its Petition for a Writ of Certiorari except so far as it is in conflict with or omits to include the following additional facts:

The time of the accident according to Forbes, the crossing-tender, was 8.02 a.m., and according to Rollinson, the truck driver, was 8.03 or 8.04 a.m., and according to O'Brien, the engineer of the train, a few seconds after 8.05 a.m. (R. 26, 51, 52, 57).

Because of the fog the visibility was restricted. Forbes could see approximately 300 feet, O'Brien approximately 800 feet, and Rollinson only 20 to 25 feet. Normally, when the weather is not foggy, one could see about 1 mile in a southerly direction along the tracks of the Boston & Maine Railroad (R. 22).

Neither Forbes nor Rollinson heard any sound of the horn on the approaching train (R. 27, 58).

The crossing is in use from 8 a.m. to 5 p.m., except for lunch between 12 and 12.30 p.m. Generally 30 to 100 trucks would pass over the crossing between 8 a.m. and 5 p.m. and approximately 10 would be trailer trucks of the type involved in this accident (R. 25). The truck and contents involved in the collision weighed approximately 60,000 pounds (R. 22).

Forbes had been employed at the Stauffer Chemical Company for at least a year prior to the accident. From his experience no train ever arrived at the crossing before its scheduled arrival time, but he had often seen trains arrive on time or as much as three quarters of an hour late (R. 27).

Although there was no railroad rule requiring a whistle or horn to be sounded on a train approaching this crossing, O'Brien said he always gave a "toot on the horn or whistle" (R. 47).

The average number of trains that passed over the crossing on October 28, 1958, was 31 per day (R. 68-69).

Reasons why Certiorari should be Denied.

Petitioner claims that the Court of Appeals misconstrued and misapplied applicable principles of law as to the duty of a railroad in the protection of private grade crossings.

In the first place, Federal law and not the law of the Commonwealth of Massachusetts applies to a case arising under the Federal Employer's Liability Act as to whether the evidence warrants a finding that the petitioner was negligent.

Sinkler v. *Missouri Pacific Railroad Co.*, 356 U.S. 326.

In the second place, Mass. G.L. (Ter. Ed.) c. 160, §§ 138 (as amended), 140 and 141, apply only to public ways and certain travelled ways, and not to private crossings. Furthermore, this statute was designed to afford protection from injury to travellers upon highways at railroad grade crossings rather than to railroad employees engaged in interstate commerce.

Sullivan v. *Hastis*, 237 Mass. 441.

The petitioner next cites the case of *Inman* v. *Baltimore & Ohio Railroad Co.*, 361 U.S. 138, as being analogous to the instant case. The respondent fails to see any resemblance whatsoever.

In the *Inman* case a crossing-flagman was hit by an intoxicated motorist who drove around a line of cars waiting for a train to pass. There was little if anything that the railroad failed to do—the regular crossing warning lights, bells, etc., were properly working; the flagman was waving a lantern; there was no claim that the crossing was dark. This court felt that the proximate cause of the accident was the conduct of the intoxicated motorist.

On the other hand, what did petitioner provide respondent's testate? It provided him with a dangerous crossing protected on a foggy day by a timetable. Under the circumstances that is the only assistance the crossing-tender had in protecting the crossing.

It is therefore quite obvious that the facts in the *Inman* case and those in the case at bar are quite different.

A case which was permitted to go to the jury, but nevertheless was much weaker on the facts than the case at bar, is *Robinson* v. *Gulf, Colorado & Santa Fe Railway Co.*, 325 S.W. 2d 432; cert. den. 362 U.S. 919.

In addition to the petitioner's failure to provide the crossing-tender with some electrical device to warn him

of the train's approach (it was agreed that such a device could have been installed), the jury's finding could have been supported in other respects as follows:

(1) That the crossing-tender, an agent of the petitioner within the meaning of the Federal Employer's Liability Act, was negligent (although not passed upon by the Court of Appeals, see *Sinkler* v. *Missouri Pacific Railroad Co.*, 356 U.S. 326);

(2) That the petitioner was negligent toward its employee, the respondent's testate, by its failure to supervise the crossing with its own experienced personnel;

(3) That, in addition to the findings of the jury on the special questions presented to it, the jury could have found other possible grounds on which to base its finding of unsafe-place-to-work (see *Arnold* v. *Panhandle & Santa Fe Railway Co.*, 353 U.S. 360).

Conclusion.

Since there is no case cited in the petition in conflict with the one at bar, and since there is substantial evidence to support the jury's finding, it is respectfully submitted that the Court of Appeals did not err and that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM B. SLEIGH, JR.,
60 State Street,
Boston, Massachusetts,

CHARLES E. HOLLY,
84 State Street,
Boston, Massachusetts,
Attorneys for Respondent.